

## 3 Rights and responsibilities

The concepts of rights and responsibilities were crucially important to the Consultation process. There are different ways of interpreting these concepts, among them in philosophical, legal and community terms.

### 3.1 Rights

#### Philosophical perspectives

Australia is a robust democracy in which the people elect their parliamentary representatives and make decisions about changes to the Constitution. Parliament and the courts make and apply laws that, it is to be hoped, pay due regard to everyone's best interests. Striking a balance between conflicting rights and between rights and the public interest can be difficult. Nowadays much of the discussion about the best interests of all people—including members of unpopular or marginalised groups—is couched in the language of human rights.

In the Boyer Lectures in 2000 the Hon. Chief Justice of Australia, Murray Gleeson, asked, 'How then does a democracy, which functions on the basis of majority rule, institutionalise protection of legitimate minority interests? This is the essential problem underlying debate about human rights'.<sup>1</sup> Debate about human rights serves two purposes: it can help shape the processes and lines of argument in parliament, the courts and government when decision makers are determining what rights should be granted to and obligations imposed on people, especially in relation to minority groups and strongly contested matters; and it can encourage discussion in the public domain about what rights and what limits on rights should be recognised in law. In a well-functioning democracy, human rights are often recognised as legal rights. There may, however, be some human rights that continue to be insufficiently recognised and protected in law.

Legal rights are individual entitlements recognised and protected by governments, courts and parliaments. A person who enjoys a legal right is able to enforce others' obligation to uphold the right. If someone has a legal right to property, others have a duty to respect that right by not interfering with the right-holder's possession and use of the property. If that duty is breached, the right-holder can seek assistance

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<sup>1</sup> A Gleeson, *2000 Boyer Lectures: the rule of law and the Constitution* (2000) 69.

from the State to uphold and enforce their right. Legal rights and legal duties are defined and enforced by law.

These days people often speak of human rights—rights that are important to them, regardless of whether those rights are set down in law. These are rights people think the State ought to recognise and protect. But what is the source of such rights? And how do we define them? Are there human rights that we can claim with moral authority or coherent political argument against the State, demanding that instruments of the State affirm and protect them even though they are not dealt with in any domestic law of the State? Philosopher Alasdair MacIntyre has boldly claimed, ‘There are no such rights, and belief in them is one with belief in witches and in unicorns’.<sup>2</sup> There is a long history of philosophical musing about the reality of human rights.

Precedents exist in a range of religious and secular philosophies. For example, Confucius’s *Analects* (compiled after his death in the 5th century BCE) promoted a society founded on respect, tolerance and generosity towards others<sup>3</sup>; the Indian emperor Asoka advocated non-violence and religious tolerance in the 3rd century BCE<sup>4</sup>; and Cicero (106–43 BCE) established the foundations of natural law, a concept closely connected to the modern idea of human rights.<sup>5</sup>

For centuries many thinkers who considered questions to do with justice and rights took as their starting point the idea that all human beings were created by God and were thus endowed with particular gifts and divinely commanded to live in a particular way. Such thinking holds little sway in the public domain today, even if some religious people still find it convincing.

Disgusted by the religious wars of the Reformation period, Dutch lawyer Hugo Grotius (1583–1645) was convinced that disputes about rights were the main cause of war. He defined a natural right to be ‘a moral quality pertaining to a person to possess or do something justly’.<sup>6</sup> Reflecting on the human person in the community, he set down the demands for a peaceful and rational life lived in community and said, ‘What we have spoken about would carry some weight even if we were to suppose that God does not exist or that God takes no interest in human affairs’.<sup>7</sup>

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<sup>2</sup> A MacIntyre, *After Virtue: a study in moral theory* (3rd edn, 2007) 69.

<sup>3</sup> Confucius, ‘On fair distribution and education’ in *The Analects*, cited in M Ishay, *The Human Rights Reader* (2nd edn, 2007) 45.

<sup>4</sup> Asoka, ‘Against religious intolerance and discrimination within the community’ in *The Edicts*, cited in M Ishay, *The Human Rights Reader* (2nd edn, 2007) 29.

<sup>5</sup> Cicero, *The Laws*, cited in M Ishay, *The Human Rights Reader* (2nd edn, 2007) 15.

<sup>6</sup> H Grotius, *De Jure Belli et Pacis* (1625), quoted in J Mahoney, *The Challenge of Human Rights: origin, development and significance* (2007) 12.

<sup>7</sup> *ibid.* 10.

Across the Channel, Thomas Hobbes (1588–1679) also spoke of natural rights. He was troubled by the English Civil War and parliament’s execution of Charles I. Two years after the execution, and anxious that people be able to avoid the state of nature in which life would be brutish and short, he published his *Leviathan*.<sup>8</sup> He thought the natural human condition was a state of war in which ‘every man has a right to everything; even to one another’s body’<sup>9</sup>, and he proposed the social contract, whereby all individuals would give up their right to govern themselves in exchange for security and peace guaranteed by a State able to provide ‘peace at home and mutual aid against their enemies abroad’.<sup>10</sup>

John Locke (1632–1704) had a less jaundiced view of the state of nature than did Hobbes:

Man being born, as has been proved, with a Title to perfect Freedom, and an uncontrolled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man or Number of Men in the World, hath by Nature a Power ... to preserve his Property, that is, his Life, Liberty and Estate, against the injuries and Attempts of other Men.<sup>11</sup>

Locke thought the laws enacted by the State needed to reflect this law of nature, which stood as ‘an eternal rule to all men’.<sup>12</sup> This thinking on natural rights was central to much of the political ferment in England, what was to become the United States of America, and France. The founding fathers of the United States declared, ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights’.<sup>13</sup> Nowadays these truths are perhaps more contested: they are definitely not self-evident. People are more likely to speak about human rights rather than natural rights.

Some philosophers continue to claim that human rights can derive from the nature of the human being. They look to what is needed for the flourishing of the individual living in the community. But, even if they were to agree on specific facts about human nature, their critics say it is impossible to logically argue from how things are to how things ought to be. You cannot just slip from ‘is’ to ‘ought’. Other philosophers claim there are very few uncontested facts about human nature. They question whether there is any such thing as an essential human nature, arguing that ‘the only lesson of either history or anthropology is our extraordinary malleability’.<sup>14</sup> Pragmatists such as Richard Rorty see a human rights culture

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<sup>8</sup> T Hobbes, *Leviathan* (1651), quoted in J Mahoney, *ibid.* 20.

<sup>9</sup> *ibid.* 12.

<sup>10</sup> *ibid.* 13.

<sup>11</sup> J Locke, *Two Treatises of Government* (1689), quoted in J Mahoney, *ibid.* 19–20.

<sup>12</sup> *ibid.* 20.

<sup>13</sup> US Declaration of Independence (1776).

<sup>14</sup> R Rorty, ‘Human rights, rationality and sentimentality’, in S Shute and S Hurley (eds), *On Human Rights: the Oxford Amnesty Lectures* (1993) 115.

emerging not from any increased moral knowledge but from our being attentive to moving and shocking stories about the violation of people's human rights.<sup>15</sup>

Kantians do not find much moral guidance in emotion; rather, they seek universal rules or maxims. Immanuel Kant (1724–1804) propounded his famous maxim 'Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means, but always at the same time as an end'.<sup>16</sup>

Some philosophers admire the thinking of Professor John Rawls, who posited the thought experiment of people standing behind a veil of ignorance, knowing little about their future prospects and agreeing on principles of justice such as 'Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar scheme of liberties for all'.<sup>17</sup> Finally, a deconstructionist critique of human rights has emerged in recent years, destabilising the idea that human rights will always lead to better outcomes.<sup>18</sup>

People disagree about what to include in the list of basic liberties, and they often seek assistance in the catalogues that have been drawn up by the community of nations in the formal human rights instruments promulgated since the United Nations was formed in 1945. In the words of Professor Louis Henkin, 'Ours is the age of rights. Human rights is the idea of our time'.<sup>19</sup>

## International law perspectives

The watershed in the world's awareness of human rights was the calamity of World War 2. After the war the world's leaders responded to the horror and destruction by establishing, by charter, the United Nations. They spoke in the name of 'We the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.<sup>20</sup>

Three years later the UN General Assembly adopted the Universal Declaration of Human Rights, stating that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that

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<sup>15</sup> *ibid.* 118–19.

<sup>16</sup> I Kant, *Groundwork for the Metaphysics of Morals* (1785) 4:429.

<sup>17</sup> Reformulated by John Rawls in *Political Liberalism: expanded edition* (2005) 291.

<sup>18</sup> See, for example, D Kennedy, *The Dark Sides of Virtue: reassessing international humanitarianism* (2004); C Douzinas, *The End of Human Rights: critical legal thought at the fin-de-siècle* (2000).

<sup>19</sup> L Henkin, *The Age of Rights* (1990) xvii.

<sup>20</sup> Charter of the United Nations, preamble.

human rights should be protected by the rule of law'.<sup>21</sup> Human dignity, equality and human rights are fundamental to freedom, justice and peace in the world.

Australia was among the countries closely involved in drafting the Universal Declaration of Human Rights. The thinkers who contributed to the drafting brought a diversity of cultures, philosophies and faiths to the table. From the United States Eleanor Roosevelt, Frenchman René Cassin, Chilean Hernan Santa Cruz, Lebanese Christian Charles Habib Malik and Chinese Confucian Peng-chun Chang were great contributors to this truly international undertaking. They consulted religious and philosophical greats such as Pierre Teilhard de Chardin, Mahatma Gandhi and Aldous Huxley. It was Teilhard de Chardin who counselled the drafters to focus on 'man in society' rather than the human being as an individual.<sup>22</sup> Dr HV Evatt, Australian Minister of External Affairs at the time and later President of the UN General Assembly, welcomed the declaration as a 'step forward in a great evolutionary process'.<sup>23</sup>

Eleanor Roosevelt saw the Universal Declaration of Human Rights to represent 'a common standard of achievement for all peoples and all nations'.<sup>24</sup> Marking the 60th anniversary of the declaration, Irish poet Seamus Heaney said:

Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system.

The articulation of its tenets has made them into world currency of a negotiable sort. Even if its Articles are ignored or flouted—in many cases by governments who have signed up to them—it provides a worldwide amplification system for the 'still, small voice'.<sup>25</sup>

When binding international legal instruments were developed on human rights, it was highlighted that certain rights are so important they can never be suspended (or 'derogated from'), even in times of public emergency. Thus the International Covenant on Civil and Political Rights states that no derogation can be made from the right to life, freedom from torture, freedom from slavery, the prohibition on imprisonment for failure to fulfil a contractual obligation, the prohibition on retrospective operation of criminal laws, the right to recognition as a person before

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<sup>21</sup> Universal Declaration of Human Rights, preamble.

<sup>22</sup> M Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 76.

<sup>23</sup> Cited in A Devereaux, *Australia and the Birth of the International Bill of Human Rights* (2005) 1.

<sup>24</sup> 'Statement by Mrs Franklin D. Roosevelt', *Department of State Bulletin*, 19 December 1948, 751, quoted in Glendon, *ibid.* 176. These words are also in the preamble to the declaration.

<sup>25</sup> S Heaney, 'The poetic redress', *The Irish Times* (Dublin) <<http://www.irishtimes.com/indepth/amensty/introduction.html>> at 10 September 2009.

the law, and the right to freedom of thought, conscience and religion.<sup>26</sup> Similarly, the Convention against Torture states, 'No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture'.<sup>27</sup>

In addition, some rights in the International Covenant on Civil and Political Rights have been recognised as 'absolute', meaning they cannot be limited in any way. Among these rights are freedom from torture and freedom from slavery.<sup>28</sup> Most absolute rights are also non-derogable, but not all non-derogable rights are absolute. For example, the freedom to manifest one's religious belief is non-derogable, yet it can in certain circumstances be limited. In contrast, the freedom to hold a religious belief is both non-derogable and absolute.<sup>29</sup>

Rights that are not absolute can be limited, either by the inclusion of specific limitations in the terms of the right itself<sup>30</sup> or by a general limitations clause.<sup>31</sup> The Universal Declaration of Human Rights recognised that certain limitations on rights might be necessary in order to recognise and respect the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society.<sup>32</sup> Sixty years later, these concepts of 'public order', 'general welfare' and 'morality' seem a little strained. In any democracy professing to uphold the dignity of all, there is still a need for public debate and decisions by governments, parliaments and courts about the justifiable limits to be placed on human rights other than those that are considered to be absolute. We also need concepts to set limits on laws and policies designed to provide the greatest good for the greatest number when such a calculus interferes with the dignity of the most vulnerable and the liberty of the most despised. Although democratically elected governments might try to justify an interference with the rights of a few people on the basis that the proposed law or policy assists a large segment of society, they need to be held to account for the rights and interests of the disadvantaged minority.

The concept of human rights has real work to do whenever those with power justify their solutions to social ills or political conflicts only on the basis of majority support or by claiming the solutions will lead to an improved situation for the mainstream majority. Even if a particular solution is popular or maximises gains for the greatest number of people, it might still be wrong and objectionable. There is a need to have

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<sup>26</sup> International Covenant on Civil and Political Rights art. 4(2).

<sup>27</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2).

<sup>28</sup> S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: cases, materials and commentary* (2nd edn, 2004) 31.

<sup>29</sup> Human Rights Committee, *General Comment 29: State of Emergency (Article 4)* (31 August 2001).

<sup>30</sup> See, for example, the limitations permitted in relation to freedom of movement in the International Covenant on Civil and Political Rights art. 12.

<sup>31</sup> See, for example, the International Covenant on Civil and Political Rights art. 4.

<sup>32</sup> Universal Declaration of Human Rights art. 29(2).

regard to the wellbeing of all members of the community. By invoking human rights, we affirm that ‘each and everyone’s well being, in each of its basic aspects, must be considered and favoured at all times by those responsible for co-ordinating the common life’.<sup>33</sup>

Professor Henkin neatly summarises the varying perspectives on the origin and basis of human rights, espousing the centrality of the idea in any society committed to freedom, justice and peace for all:

Although there is no agreement between the secular and the theological, or between traditional and modern perspectives on human beings and on the universe, there is now a working consensus that every man and woman, between birth and death, counts, and has a claim to an irreducible core of integrity and dignity. In that consensus, in the world we have and are shaping, the idea of human rights is an essential idea.<sup>34</sup>

‘Human rights’ is the contemporary language for embracing, and the modern means of achieving, respect and dignity for all.

## Community perspectives

As it travelled around Australia, the Consultation Committee heard people associate human rights with dictatorships in places such as Zimbabwe, the former Soviet Union and Myanmar or with high-profile cases such as those of David Hicks, Cornelia Rau and Dr Mohamed Haneef.

But human rights are not just about people in extraordinary circumstances.<sup>35</sup> Too often they are concerned with people in very ordinary circumstances. During the community roundtables examples emerged of people being discouraged from reporting crime or being ignored when they did so, being turned away from hospitals, or being refused other basic services. In Alice Springs two members of the Committee saw in the city centre a public toilet where an admission fee was charged and attendants were present: the main purpose of the fee seemed to be to deny some members of the community access to the facility. At



Community leader Boniface Perdjert and secretariat members with Frank Brennan and Mary Kostakidis at Wadeye

<sup>33</sup> J Finnis, *Natural Law and Natural Rights* (1980) 214.

<sup>34</sup> L Henkin, ‘Religion, religions, and human rights’, in EM Bucar and B Barnett (eds), *Does Human Rights Need God?* (2005) 145, 155.

<sup>35</sup> Mary Kostakidis, National Human Rights Consultation opening speech.

the Tennant Creek community roundtable examples were provided of pregnant Indigenous women who required medical treatment or were preparing for childbirth being told to present themselves for treatment but with no, or grossly inadequate, public transport arrangements being made to facilitate their attendance when it was obvious they had no access to other means of travel. At a Canberra community roundtable a participant remarked that the vulnerable, the aged, the frail and people with disabilities were often left without sufficient help to afford them the opportunity to experience even the basic enjoyments of life.

The Consultation Committee concluded that those who find themselves marginalised are not few; indeed, each one of us, if fortunate, will one day be part of a very large but often marginalised group, the elderly. It might be then that we worry about our right to the highest attainable standard of health, our right to live or die with dignity, and our rights to family and to equality.

During the community roundtables the Committee continually heard people speak of human rights in terms of ‘a fair go’ for all. Participants were often upset by instances of unjustified discrimination against themselves or people they knew. They would demand equality for all, especially those who are different or disadvantaged. They would ask when is it fair to treat people differently and when is it unfair to treat them similarly.

In the terms of reference for this Human Rights Consultation the Australian Government states its commitment ‘to the protection and promotion of human rights—a commitment that is based on belief in the fundamental equality of all persons’. When becoming an Australian citizen, a person takes the following pledge:

From this time forward, (under God)  
I pledge my loyalty to Australia and its people,  
whose democratic beliefs I share,  
whose rights and liberties I respect, and  
whose laws I will uphold and obey.

The new citizen is given a booklet, *Australian Citizenship: our common bond*. Although the booklet does not list our rights and liberties, it does list the privileges of citizenship—to apply for work in the Australian Public Service and the Australian Defence Force, to seek election to parliament, to apply for an Australian passport and to enter Australia freely, to receive help from an Australian official while overseas, and to register children born overseas as Australian citizens by descent. There is no listing of Australian human rights, but there is a list of ‘our democratic beliefs’, ‘our freedoms’ and ‘our equalities’. During its consultations the Committee became aware of a deep resonance between human rights and the following beliefs, freedoms and equalities expressed in the guide for new citizens:

- parliamentary democracy
- the rule of law
- living peacefully
- respect for all individuals regardless of background
- compassion for those in need
- freedom of speech and freedom of expression
- freedom of association
- freedom of religion and secular government
- equality in Australia
- equality of men and women
- equality of opportunity.

The Committee adds three more values to this list:

- access to justice
- respect for diversity and difference
- respect for the place and needs of Indigenous Australians.

The Committee's Consultation helped improve many participants' understanding of what human rights are. They found the concept of 'human rights' helpful in working out what constitutes a fair go for everyone.

Human rights can be enjoyed or adversely affected in many day-to-day interactions people have with public authorities. They can affect the way victims interact with the criminal justice system. Defined human rights can be useful criteria for assessing immigration laws and policy. And they can be good yardsticks for decisions about access to education and the dignified treatment of the elderly.

In this way human rights become a part of our lives and the lives of our friends and loved ones. Whether we are aware of it or not, human rights affect each one of us each day, and when these rights are denied, trampled on or unduly limited we justifiably want greater respect for our dignity and acknowledgment of our entitlements. The right to education entails guaranteed access to good schooling for our children. The right to housing requires that affordable housing be accessible even to someone without a job at the onset of winter and in the midst of an economic crisis. Being able to go to a hospital to seek medical treatment regardless of whether we can afford private health insurance is an aspect of the right to the highest attainable standard of health. Our fundamental right to freedom of speech means we should be able to feel safe when speaking out against injustice.

Many of the submissions the Committee received took the seven primary international human rights instruments ratified by Australia as the foundation documents setting out the human rights that should be recognised, respected and honoured in Australia. Chapter 5 describes those instruments, the main two of which are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. An examination of the structure of these two covenants is useful when considering how human rights relate to each other and how they can be limited.

### **How human rights relate to each other and how they can be limited**

In 1993 the World Conference on Human Rights in Vienna declared that ‘all human rights are universal, indivisible and interdependent and interrelated’ and ‘the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis’.<sup>36</sup> No particular set of human rights is more important than another. There is no hierarchy of human rights. All such rights should be enjoyed without discrimination.

As noted, in the international instruments some human rights are considered so important that they cannot be derogated from, even in a time of emergency. Sometimes, however, interference with human rights is considered



The Taree community roundtable

justified in order to re-establish the conditions in which human rights might be better enjoyed by everyone. For example, in times of national emergency States that are party to the International Covenant on Civil and Political Rights are permitted to suspend certain human rights so as to deal with the emergency. They can suspend their obligations under the ICCPR provided they limit their actions to those strictly required to respond to the exigencies of the situation, provided they act in a non-discriminatory way and provided they do not breach their other obligations under international law. They are not, however, permitted to derogate from their obligation to respect specific fundamental rights such as the right to life, freedom from torture,

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<sup>36</sup> UN General Assembly, World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action art. I(5).

freedom from slavery, and freedom of thought, conscience and religion ('non-derogable rights').<sup>37</sup>

When there is no situation of national emergency, States parties are required to respect and uphold rights. As discussed, some rights in the ICCPR have been recognised as 'absolute', meaning they cannot be limited in any way. Many rights are, however, defined in terms that permit regular limitation for good reason. For example, the ICCPR provides for a right of peaceful assembly. The right of the protester must accommodate the right of others to go about their lawful business. So legal limits can be imposed on the right to protest provided those limits 'are necessary in a democratic society in the interests of national security or public safety, public order ... the protection of public health or morals or the protection of the rights and freedoms of others'.<sup>38</sup>

When it comes to economic, social and cultural rights such as the rights to health, housing, employment and education, the international community has acknowledged that respect for and protection and promotion of such rights is often more complex.<sup>39</sup> Governments always work with finite resources; parliaments weigh conflicting claims by a diverse range of constituents when deciding how resources should be allocated to the provision of services in areas such as health, education and housing. It is all very well to espouse a right to work, but in times of economic downturn there are limits to how far governments, even democratic ones, can go in providing assistance to unemployed people in search of work. The International Covenant on Economic, Social and Cultural Rights recognises that full implementation of economic and social rights may not be immediately possible but requires States to take steps to the maximum of their available resources to progressively achieve the rights. Article 2.1 of the covenant provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In Australia some of the most spirited political debate is about the allocation of resources in order to accommodate these rights—especially for disadvantaged groups and people living in remote and regional areas. Even when there is agreement about the need for a greater allocation of resources to achieve recognition of these rights for all, there can be furious disagreement about the political philosophy to apply and the level of government to take responsibility.

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<sup>37</sup> See International Covenant on Civil and Political Rights arts 4, 6, 7, 8.1, 8.2, 11, 15, 16 and 18.

<sup>38</sup> *ibid.* art. 21.

<sup>39</sup> It should be noted that civil and political rights can also be resource-intensive—for example, the right to a fair trial.

Some might favour legislative guarantees of these rights; others think there are more appropriate means than economic and social rights being enforceable by the courts.

The drafters of the International Covenant on Economic, Social and Cultural Rights obviously envisaged a continuing variety of political perspectives on individual entitlements to State assistance with the enjoyment of these rights. Unlike the ICCPR, which does not include a general limitations clause, the ICESCR provides that 'the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.<sup>40</sup> It is possible for elected politicians to argue in good faith that they are respectful of the ICESCR while restricting the availability of taxpayer funds for employment programs or for health services to remote communities; they would argue that such funds are better spent for the general welfare of the community by providing an economic stimulus for all or by providing specialist health services in population hubs.

If Australians want to ensure faithful compliance with these international instruments as a means of increasing everyone's enjoyment of human rights, we face some fundamental questions:

- Which level of government is best equipped to take primary responsibility for the protection of these rights?
- Is legislation the most suitable means of protection?
- Which organ of government is best suited to ensuring protection of these rights and delimitation of the rights when that is justified under the international instruments?

In our federal system there is always a need for cooperation between the different levels of government. There is also a need for appropriate allocation of tasks between the executive, the parliament, and the judiciary.

Whenever a parliament enacts a law that recognises a catalogue of human rights it might be necessary to include words of limitation. The Victorian *Charter of Human Rights and Responsibilities Act 2006*, for example, recognises that human rights might have to be limited in some circumstances. Under the charter, rights may be limited but only when justified in a free and democratic society, taking into account a number of listed factors. The following factors should be considered:

- Which right is to be limited? Is the right an absolute or a non-derogable right?

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<sup>40</sup> International Covenant on Economic, Social and Cultural Rights art. 4.

- Is the reason for wanting to limit the right pressing and important to society?
- What sort of limitation is being proposed? How might it infringe human rights?
- Is the limitation likely to achieve its purpose? Is it excessive or out of proportion to its purpose?
- Are there any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve?

For example, the right to freedom of expression might be restricted in order to respect the rights and reputation of other people or for the protection of national security, public order, public health or public morality. A balance must be struck between people's rights and the need for government departments and other public authorities to protect the broader public interest.

## 3.2 Responsibilities

### Philosophical perspectives

In the first of her 2002 Reith Lectures, entitled 'A question of trust', Baroness O'Neill said:

We fantasise, in my view irresponsibly, that we can promulgate rights without thinking carefully about the counterpart obligations, and without checking whether the rights we favour are consistent, with one another let alone set feasible demands on those who have to secure them for others.<sup>41</sup>

In her second lecture she elaborated:

The underlying difficulty of any Declaration of Rights is that it assumes a passive view of human life and citizenship. Rights answer the questions 'What are my entitlements?' or 'What should I get?'. They don't answer the active citizen's question 'What should I do?'.<sup>42</sup>

Yet no claim to rights has the faintest chance of making a real difference without clear answers to the question 'What should I do?'.<sup>42</sup>

Legal rights are usually enforceable in the courts, and this means people have a duty to respect and uphold those rights. Human rights in the various declarations of rights are not always enacted as legal rights in a domestic legal system. If they are asserted meaningfully in the public domain—even when they are not recognised as legal rights—there must be some responsibilities or duties imposed on or voluntarily

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<sup>41</sup> Available at <<http://www.bbc.co.uk/radio4/reith2002/lecture1.shtml>>.

<sup>42</sup> Available at <<http://www.bbc.co.uk/radio4/reith2002/lecture2.shtml>>.

assumed by individuals or the State. If a moral claim to a human right is made, that claim can have no meaning unless a moral claim of responsibility to recognise, respect and protect that right can be asserted against another. Professor Jack Mahoney says moral rights give rise to moral duties: 'In the moral sphere the very point of recognising rights is to create the possibility of making claims on others, who when identified have corresponding moral duties to respect those claims'.<sup>43</sup> Some communitarian philosophers, such as Professor Mary Anne Glendon, have warned that, without sufficient attention to responsibilities, 'the new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires'.<sup>44</sup> She speaks of the need:

... for refining our deliberations concerning such matters as whether a particular issue is best conceptualised as involving a right; the relation a given right should have to other rights and interests; the responsibilities, if any, that should be correlative with a given right; the social cost of rights; and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity.<sup>45</sup>

If it makes sense to speak of human rights as being more than the legal rights enforceable in domestic law, we must be able to assert the need for individuals and the State to fulfil their duties and honour their responsibilities so that these human rights might be enjoyed with or without domestic legal protection.

## **International law perspectives**

All the important international human rights instruments make some mention of duties and responsibilities. Article 1 of the Universal Declaration of Human Rights proclaims that human beings 'should act towards one another in a spirit of brotherhood'. This is not the sort of aspiration that could ever be legislated or legally enforced. It is a responsibility that can be assumed only voluntarily, with support and encouragement from others who instil a culture of care and respect for all.

Article 29 of the declaration provides, 'Everyone has duties to the community in which alone the free and full development of his personality is possible'. So here in the heart of the modern world's most celebrated declaration of human rights is an acknowledgment that we all have not just rights but also duties—duties to the community, which, perhaps counter-intuitively, enable us to develop our personalities. The preambles of both the ICCPR and the ICESCR are drafted in such a way as to confirm that individuals have not only human rights but also responsibilities: 'The individual, having duties to other individuals and to the

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<sup>43</sup> J Mahoney, *The Challenge of Human Rights: origin, development and significance* (2007) 90.

<sup>44</sup> M Glendon, *Rights Talk: the impoverishment of political discourse* (1991) 171.

<sup>45</sup> *ibid.* 177.

community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant’.

In 2003 Miguel Alfonso Martinez, who was appointed Special Rapporteur by the Economic and Social Council at the request of the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights, delivered his report entitled *Promotion and Protection of Human Rights*. He noted:

The Special Rapporteur starts out from the premise that the idea that there can be rights without ethical duties or responsibilities, or rights not based on equity and human solidarity, constitutes a patent breach of logic, as well as a social impossibility. The proof is the thousands of millions of human beings in the world who today suffer from all sorts of deprivations, and the generalized crisis in the economy, the environment and governance that visibly marks today’s world should serve as a clear warning to all. Freedoms recognized only generically and in the abstract are simply useless. On the other hand, to argue that social duties can exist without individual rights is not only unimaginable, but absolutely unacceptable under the principles of ethics and equity.

For these reasons he considers that all persons have, at the same time, *rights, obligations and duties* in all aspects of life touching on the promotion, effective realization and protection of *all* human rights. Neither from a legal point of view, nor on the ethical plane, is it possible to conceive of rights without such a logical correlation. Every right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented.

The recognition of individual or collective human rights requires, at the same time, the acknowledgement—with equal zeal—of the matching importance of the duties or responsibilities that are incumbent upon every individual. Only in this way will it be possible to establish an ethical basis upon which to begin to make possible that world ‘in larger freedom’ whose advent we have been awaiting since the Charter of the United Nations was signed.<sup>46</sup>

So human rights entail responsibilities. This is not to say that if you are not responsible you do not have human rights: everyone has human rights by virtue of being human. Human rights law is traditionally concerned with relations between the State and its subjects; responsibilities, however, need not be limited to relations between the State and the individual. Individuals can have responsibilities to each other, even if not legally enforceable. Discharging social obligations with mutual respect between public officials and the public, employers and employees and, more generally, between all people makes for a better society.

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<sup>46</sup> *Promotion and Protection of Human Rights*, Report to the United Nations Economic and Social Council (17 March 2003) paras 42–4.

The notion of corporate responsibility is an emerging concern in the international discourse on human rights. The ACT Human Rights Act has an ‘opt-in’ clause for corporations.

The Committee received from Professor John Ruggie, UN Special Representative of the Secretary-General, a submission on the subject of human rights and transnational corporations and other business enterprises. The submission outlined a three-pronged approach to augmenting the responsibilities assumed by transnational corporations—‘the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies’. Professor Ruggie says that these ‘three principles form a complementary whole in that each supports the others in achieving sustainable progress’.<sup>47</sup> The Human Rights Law Group of Malleons Stephen Jaques submitted that ‘at this stage, specific legislation or industry codes rather than a Human Rights Act remain more appropriate mechanisms for directly enforcing human rights obligations with respect to the actions of private bodies’.<sup>48</sup>

## Community perspectives

The question of whether, and if so to what extent, responsibilities should be included in any bill of rights has been the subject of recent consideration in the United Kingdom. In 2008 the Joint Committee on Human Rights concluded:

Responsibilities ... often have some role to play in modern Bills of Rights, albeit falling far short of directly enforceable duties. It may be in the form of a preamble referring to responsibilities; a limitation clause acknowledging that some rights can be justifiably limited to serve some other competing interest; positive obligations on the state to protect the rights of individuals against other private individuals; the indirect effect of the Bill of Rights on the law governing private relations because of the duty on courts to interpret the common law compatibly, including the common law governing private relations; or a prohibition on abuse of rights. All of these are manifestations of responsibilities being taken into account in Bills of Rights and none are controversial.<sup>49</sup>

More recently, the UK Ministry of Justice has released a consultation paper on rights and responsibilities. It suggests that among the primary responsibilities for all members of its society could be:

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<sup>47</sup> His report to the UN General Assembly’s Human Rights Council, *Protect, Respect and Remedy: a framework for business and human rights*, was attached to the submission. See A/HRC/8/5 (7 April 2008) 1.

<sup>48</sup> Malleons Stephen Jaques Human Rights Law Group, Submission.

<sup>49</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* Twenty-ninth Report of Session 2007–08 (2008) 74.

... treating National Health Service and other public sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits; participating in civic society through voting and jury service; assisting the police in reporting crimes and co-operating with the prosecution agencies; as well as general duties such as paying taxes and obeying the law.<sup>50</sup>

Although the question of responsibilities was raised during a number of community roundtables, few submissions discussed the matter in any detail. A range of submissions highlighted the interrelated nature of rights and responsibilities; for example, citizens have not only the right to vote in Australia but also a responsibility to cast a ballot as part of a system of compulsory voting.<sup>51</sup> In addition, governments have responsibilities in connection with human rights:

Governments bear the ultimate responsibility for the realisation of human rights. However, in order for human rights to be achieved, individuals and other non-government actors are also required to respect and not breach the human rights of others. Therefore, governments have a further obligation to ensure that individuals and non-government actors are aware of human rights and can discharge their responsibilities in accordance with their obligations.<sup>52</sup>

There was strong concern that an emphasis on rights without a corresponding emphasis on responsibilities could engender an individualistic and even selfish approach to community living, with people demanding that their insistent desires be met by someone else or by the State without any consideration of the costs involved. Some participants went so far as to insist that rights should be denied to those who fail to fulfil their responsibilities. Participants were often able to provide a comprehensive listing of rights, but they tended to be more vague when detailing the responsibilities that should be imposed on individuals. The booklet *Australian Citizenship: our common bond* lists only four specific responsibilities of citizenship—to obey the law, to vote, to serve on a jury, and to defend Australia should the need arise.

## The listing of responsibilities

When enacting its human rights legislation, Victoria embraced the concept of responsibilities in the title of the Act—the *Charter of Human Rights and Responsibilities Act 2006*—and in the preamble, but no responsibilities are enumerated in the Act. The ACT’s *Human Rights Act 2004* declares, ‘This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others’.<sup>53</sup> A private member’s Bill suggesting that the ACT adopt a ‘Bill of Responsibilities’, which was intended to

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<sup>50</sup> UK Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (2009) 9.

<sup>51</sup> G Williams, Submission.

<sup>52</sup> Australian Council for International Development, Submission.

<sup>53</sup> ACT *Human Rights Act 2004* (ACT), preamble (5).

have paramountcy over the bill of rights, was proposed but not supported following the adoption of the Human Rights Act.<sup>54</sup> The Canadian Charter of Rights and Freedoms does not mention responsibilities; nor do the UK Human Rights Act and the US Bill of Rights.

To date, parliaments enacting human rights legislation have not seen fit to legislate an accompanying set of duties and responsibilities. Even if there are no additional, legally enforceable duties imposed on everyone in the jurisdiction so that all might enjoy their human rights more fully, there will always be greater protection of human rights when citizens as well as public officials take more responsibility for their neighbours, especially those most at risk.

If we are to create a culture of human rights, regardless of the legal enforcement mechanisms that might be instituted, education about responsibilities is just as important as education about rights. It is imperative that we provide better opportunities for citizens to answer the question ‘What should I do and what can I do to create a society in which the just entitlements of all people are acknowledged, respected and fulfilled?’ Even if a list of responsibilities is not included in any human rights statute, such a list would be a helpful tool for a citizen who is concerned with more than their own individual entitlements.

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<sup>54</sup> B Stefaniak, ‘A reflection on the ACT Human Rights Act’ in J Leeson and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009) Submission, 313.